

No. 15115

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH O. HUTCHENS,

Appellant,

vs.

LOUIS D. FAAS; BERNICE H. FAAS; LEONARD A. FAAS;
GENEVIEVE E. FAAS; Co-partners doing business as
KING O'LAWN MANUFACTURING Co.; WALTER FAAS;
RUDOLPH FAAS; M. W. ENGLEMAN, Assignee for
Benefit of Creditors for KING O'LAWN MANUFACTUR-
ING Co.; KING O'LAWN, INC., a California Corpora-
tion,

Appellees.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

Jurisdictional Statement.

This is an appeal in the above-entitled action for in-
fringement of United States Letters Patent No.
2,719,398.

The District Court of the United States for the
Southern District of California, Central Division, had
jurisdiction under 28 U. S. C. 1338(a) and 1400(b).
A final decision having now been entered in said District
Court, this Court of Appeals has jurisdiction under 28
U. S. C. 1291.

II.

Statement of the Case.

This infringement action involves the infringement of a patent granted to plaintiff-appellant, No. 2,719,398 [Tr. pp. 85-89], relating to a device that could be used to either trim or edge a lawn. Plaintiff had previously been granted a patent, No. 2,618,919 [Tr. pp. 80-84], not in suit, pertaining to a device that embodied two cutters which could be concurrently used for edging and trimming grass, or if desired, both cutters could be set to simultaneously edge or trim grass. The two above-mentioned patents were co-pending as applications in the Patent Office from June 16, 1950 to November 25, 1952.

Although not in suit, Patent No. 2,618,919 is very important as a model of the invention described therein was manufactured and publicly used on August 10, 1948, which date was more than one year prior to June 16, 1950, the filing date of the application on which said patent in suit was granted. The defendants contended, and the Trial Court concluded that this prior use of the '919 device so limited the scope of the claims at issue that they were not infringed by the accused device. [Tr. pp. 67-68.]

The device disclosed in the '919 patent includes an engine-supporting frame B from which two members 1 and 2 extend forwardly to rigidly support two racks 4 and 23.1 and pivotally support two plates 21 and 22 from which levers 12 and 13 projected upwardly for actuating purposes. Frame B remains in a horizontal position and is movably supported by any desired number of wheels 3. Two arm structures are rigidly affixed to plates 21 and 22, and can be independent-

ly pivoted upwardly or downwardly to dispose cutters 10 and 19 in the desired relationship relative to the ground surface. Said arm structures so support cutters 10 and 19 that each cutter can be vertically or horizontally disposed, or adjusted to a position therebetween. A handle 29 extends upwardly and rearwardly from frame B to guide same.

After inventing the above-described device and filing a patent application thereon, plaintiff found as a result of further experimental work, that a much simpler machine could be provided which, while not permitting concurrent lawn edging and trimming, did allow either edging or trimming thereof by means of suitable adjustment of the single power-driven cutter associated with the machine, as shown in Transcript, page 85. After inventing the second combined lawn edging or trimming device, plaintiff file a patent application thereon, on which the patent in suit was granted.

The device disclosed and claimed in the patent in suit includes a base that is angularly adjustable relative to the ground surface and supported by wheel means which make such adjustment possible. A single arm structure is provided, which when the invention is in an operative condition, projects forwardly from one side of the base and adjustably supports a cutter that can be disposed in either a vertical position for edging, a horizontal position for trimming, or a position intermediate the horizontal and vertical. Angular adjustment of the base relative to the ground surface to likewise control the distance of the cutter therefrom is accomplished by movement of a handle that extends upwardly and rearwardly from the base.

The accused devices of which Defendants' Exhibit "E" is typical, are identical to the structure disclosed in the patent in suit, with the exception that the base is movably supported on three wheels, one of which wheels by a lever arrangement is vertically movable relative to the base to permit angular adjustment of the base relative to the ground surface as vertical movement of said wheel occurs.

Although the side members extending forwardly from the engine-supporting frame B, the racks 4 and 23.1, levers 12 and 13, plates 21 and 22 were essential elements in the combination disclosed and claimed in plaintiff's first patent, and were not included as elements in his second patent disclosure, the defendants contended, and the Trial Court concluded, that in view of the public use of plaintiff's first invention, the claims at issue could not be interpreted broadly enough to be infringed by the accused devices.

Final judgment was entered on January 30, 1956 [Tr. pp. 68-69] holding that the claims at issue were not infringed by the accused devices. On February 29, 1956, a Notice of Appeal [Tr. pp. 69-70] was filed by plaintiff.

III.

The Questions Involved.

1. Arguments Raised Below.

The defenses below to the obvious infringement of Claims 6, 7, 8, 9, 10, 15 and 16 of appellant's Patent No. 2,719,398 were:

- (a) the invention of said Patent No. 2,719,398 lies in a very crowded art, and therefore the claims at issue must be limited to a very narrow range of equivalents;

- (b) the claims at issue cannot be interpreted broadly enough to read on devices admittedly manufactured and sold by appellees since the date of issuance of said patent, for to do so would cause the claims to read on Plaintiff's Exhibit "B";
- (c) that Plaintiff's Exhibit "B" is a combined lawn edger and trimmer made in accordance with the disclosure in plaintiff's Patent No. 2,618,919 which was publicly sold and used on and after August 10, 1948, which is more than one year prior to June 16, 1950, the filing date of the application on which Patent No. 2,719,398 was granted;
- (d) the scope of the claims at issue must be limited due to the device disclosed in appellant's prior Patent No. 2,618,919.

2. The Decision Below.

The District Court held:

- (a) that defendants have neither severally nor jointly infringed said Patent No. 2,719,398 and particularly Claims 6, 7, 8, 9, 10, 15 and 16 at issue;
- (b) that the issue of validity of said Letters Patent No. 2,719,398 as raised by the pleading and evidence has not been determined by this Court in view of its holding upon the issue of infringement.

IV.

Specifications of Error.

The Court below committed the following error in its Conclusions of Law:

1. Conclusion of Law III is erroneous in stating that defendants have neither severally nor jointly infringed Claims 6, 7, 8, 9, 10, 15 and 16 at issue as charged by the plaintiff. Said claims cannot be interpreted broadly enough to be infringed by the accused devices without also causing them to read on the prior art machine, Defendants' Exhibit "B."

The Court below committed the following additional errors:

1. The Court's judgment is contrary to and not supported by the evidence in the case in that

(a) The Court erred in not finding that the defendants had jointly and severally infringed Claims 6, 7, 8, 9, 10, 15 and 16 of Patent No. 2,719,398.

(b) The Court erred in finding that the claims at issue must be limited to a very narrow range of equivalents.

(c) The Court erred in finding that defendants' accused devices employ an arm pivoted on the frame for supporting the front wheel, and hence the "wheel means" *per se* of the accused devices do not permit angular adjustment of the engine support.

(d) The Court erred in finding that the handle embodied in the accused devices does not permit angular adjustment of the engine support, and that such adjustment is accomplished by means of the wheel arm and lever system.

(e) The Court erred in considering the machine, Defendants' Exhibit "B," a prior art machine, for the patent application disclosing and claiming same was filed by plaintiff and was co-pending in the United States Patent Office with his patent application on which the patent in suit was granted.

(f) The Court erred in finding no infringement of the claims at issue, when such infringement had been admitted by defendants in evidence introduced at the trial by appellant without objection by appellees.

The Court below committed the following additional error:

1. Failed to grant judgment in favor of plaintiff for royalties and damages

(a) as to all of the infringing devices manufactured and sold by defendants since the date of issuance of Patent No. 2,719,398.

V.

Summary of Argument.

It will be shown that:

1. Defendants admit that plaintiff is the owner of United States Letters Patent No. 2,719,398 and has been the owner thereof since October 4, 1955, the date of issue thereof.

2. Defendants have since October 4, 1955, manufactured and sold accused devices which are described by the claims at issue.

3. Defendants have admitted by answers to Interrogatories and responses to Request for Admission of Facts that accused devices have been manufactured and sold since October 4, 1955, that infringe at least Claim 16 of United States Letters Patent No. 2,719,398.

4. The Trial Court erroneously found that the invention defined in Patent No. 2,719,398 lies in a very crowded art and therefore the claims at issue must be limited to a very narrow range of equivalents.

5. The Findings of Fact, Conclusions of Law and Judgment of the Trial Court are not supported by the evidence.

6. The Judgment of the Trial Court should be reversed.

VI.

The Statutory Provisions.

The following provisions from the Patent Act of July 10, 1952 (Public Law 593, 82nd Cong., 2d Sess., Ch. 950; 66 Stat. 792):

The Enacting Clause

An Act

To revise and codify the laws relating to patents and the Patent Office, and to enact into law title 35 of the United States Code entitled "Patents."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 35 of the United States Code, entitled "Patents," is revised, codified, and enacted into law, and may be cited, "Title 35, United States Code, section" as follows:

35 U. S. C., Sec. 100. Definitions.

When used in this title unless the context otherwise indicates—

- (a) The term "invention" means invention or discovery.

- (b) The term “process” means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

* * * * *

35 U. S. C., Sec. 101. Inventions patentable.

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U. S. C., Sec. 102. Conditions for patentability; novelty and loss of right to patent.

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or onsale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United

States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce the practice, from a time prior to conception by the other.

35 U. S. C., Sec. 103. Conditions for patentability; non-obvious subject matter.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U. S. C., Sec. 271. Infringement of patent.

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (4) sought to enforce his patents rights against infringement or contributory infringement.

* * * * *

35 U. S. C., Sec. 282. Presumption of validity; defenses.

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

POINT ONE.

Defendants Admit That Plaintiff Is the Owner of United States Letters Patent No. 2,719,398 and Has Been the Owner Thereof Since October 4, 1955, the Date of Issue Thereof.

Defendants did not challenge plaintiff's ownership to Patent No. 2,719,398 and have specifically conceded this in their answer to Paragraph VI of plaintiff's second amended complaint [Tr. pp. 51-52].

POINT TWO.

Defendants Have Since October 4, 1955, Manufactured and Sold Accused Devices Which Are Described by the Claims at Issue.

For convenience of discussion Claim 16 has been reproduced herein, and the elements therein recited separately, which elements are individually identified by the letters A to K, inclusive.

16. A device for use in so supporting a rotatable cutter that it can be driven in any one of a plurality of positions between the vertical and horizontal and at the desired elevation above the ground in lawn trimming and edging operations, including:

A. a base;

B. wheel means that movable support said base for angular adjustment thereof relative to the surface on which said wheel means rests;

C. a handle extending upwardly and rearwardly from said base for guiding same;

D. a prime mover mounted on said base;

E. a driving pulley that is rotated by said prime mover in a fixed position;

F. a shaft on which said cutter is mounted;

G. a bearing in which said shaft is rotably supported;

H. a driven pulley rigidly affixed to said shaft:

I. an elongate rigid member normally disposed to said shaft when said shaft is disposed to said bearing, which member is rigidly affixed to said bearing;

J. a belt extending between said driving and driven pulleys;

K. and mounting means positioned on one side of said base that adjustably support said first member for longitudinal and rotatable movement, which mounting means so supports said member that said belt is in vertical alignment with at least a portion of said driven and driving pulleys when said member is so disposed as to support said cutter in either a horizontal or vertical position.

The Trial Court found and defendants admit in Finding of Fact XI [Tr. p. 66] that the accused device includes the following elements in combination, which elements for comparison with those in Claim 16 are identified by the same letters used in identifying the elements of that claim but to which a prime has been affixed.

A' "frame of the machine."

B' ". . . three wheels for supporting the frame of the machine. Two rear wheels are mounted to rotate about a common axis and the third front wheel is mounted on an arm pivoted to the frame. The frame may be raised and low-

ered with respect to the front wheel by means of a lever system connected to the arm.”

C’ The handle is not mentioned specifically as an element in Finding of Fact XI. In answer to Request for Admission No. 6 [Tr. pp. 5 and 37-38] defendants admit the use of such a handle in the structure of the accused device.

D’ “an engine on the frame.”

E’, F’, “Bearings in the housing support a transverse
G’, H’, shaft carrying a cutter blade and a driven pulley.

J’ The pulley is belt driven from an engine on the frame. The rod, housing, shaft, cutter blade and driven pulley can be turned about the rod axis so that the cutter blade can operate vertically or horizontally, or at inclined positions as required.”

I’ “a longitudinal rod and the forward end of the rod carries a housing.”

K’ “A sleeve fixed on the frame telescopically receives a longitudinal rod and the forward end of the rod carries a housing. . . . Friction clamp means are provided to maintain the rod in the desired angular position.”

From the above comparative analysis it will be seen that while the defendants have chosen to use different terminology than employed by plaintiff in describing the accused device, yet each and every element found in Claim 16 is also found in the accused device.

POINT THREE.

Defendants Have Admitted by Answers to Interrogatories and Responses to Request for Admission of Facts That Accused Devices Have Been Manufactured and Sold Since October 4, 1955, That Infringe at Least Claim 16 of United States Letters Patent No. 2,719,398.

Plaintiff's Request for Admission of Facts [Tr. pp. 3-7] and defendants' reply thereto [Tr. pp. 37-38] were admitted at the trial as evidence without opposition.

Defendants, in reply to Request Nos. 3 and 4 [Tr. pp. 37-38] admitted that lawn trimmers and edgers identified as Junior, Gardener, Special and Senior Models have been manufactured and sold by defendants since October 4, 1955.

Defendants' replies to Request for Admission of Facts Nos. 5, 6, 7, 8 and 11 [Tr. pp. 5-7, and 37-38] admit that all of the elements A-K, inclusive, of Claim 16 as set forth under Point II were present in said Junior, Gardener, Special and Senior Models which were manufactured and sold by defendants since October 4, 1955. This admission on the part of defendants is further supported by Exhibit "A" attached to plaintiff's Request for Admission of Facts [Tr. pp. 3-15] which shows that the accused devices embodied element by element the structure set forth in Claim 16—without recourse to equivalents. Each of the elements set forth in Claim 16 will also be found present in Defendants' Exhibit "E," a physical exhibit which is a full-size exemplar of the accused device.

POINT FOUR.

The Trial Court Erroneously Found That the Invention Defined in Patent No. 2,719,398 Lies in a Very Crowded Art and Therefore the Claims at Issue Must Be Limited to a Very Narrow Range of Equivalents.

The Trial Court in its Conclusions of Law held that the claims at issue cannot be interpreted broadly enough to be infringed by the accused device without also causing them to read on the machine, Defendants' Exhibit "B."

The device disclosed in the Hutchens Patent No. 2,618,919 requires as essential elements thereof:

- (a) Side members 1 and 2 that extend forwardly from a base;
- (b) Racks 4 and 23.1 united to or formed integral with said side members at their forward ends;
- (c) Levers 12 and 13;
- (d) Plates 21 and 22 that pivotally support said levers from the forward end portions of said side members.

These elements are essential in the operation of the Hutchens device disclosed in Patent No. 2,618,919, irrespective of whether the cutters thereof are used concurrently in edging and trimming, or whether one of the cutters is used individually for edging or trimming.

These elements tabulated above are not used in the Hutchens device disclosed in the patent in suit, or in defendants' Junior, Gardener, Special or Senior Model, and would not serve any useful purpose if included as a part thereof. Therefore, Claim 16 of the patent in suit, if read literally, defines the Hutchens device as de-

scribed and illustrated in the patent in suit, as well as defendants' Junior, Gardener, Special and Senior Models, but does not describe the device shown and described in the Hutchens Patent No. 2,618,919.

Defendants also contended that the claims at issue describe the invention defined in the Boggs Patent No. 2,538,250. The Boggs patent described and claimed a device as shown [Tr. p. 52] that movably supported a power driven hub in such a position that a number of vertically disposed wires pivotally affixed to the hub could rotate in a vertical plane to edge grass, and there was no description in the patent of a device that could be used either for the edging or trimming of grass as defined by the claims at issue, particularly Claim 16. Further, the Boggs patent was considered as a reference by the Patent Office during the prosecution of the application on which Patent No. 2,719,398 was granted, and considered that the claims at issue do not describe the Boggs device and defined an improvement in the art that amounted to invention over the Boggs device.

In defense of their infringement defendants relied on a number of prior art patents pertaining to such non-analogous fields as the art of logging and timbering equipment. The prior art may be crowded as the Trial Court suggests, but it is crowded with impractical and unworkable devices that cannot be used in the simple manner of plaintiff's invention as defined in the claims at issue. If the prior art is to be crowded as suggested by the Trial Court it must be by including devices taken from non-analogous fields, which devices have no bearing on the patentable novelty of plaintiff's invention as defined in the claims at issue, which are strictly limited to the art of lawn edging and trimming equipment.

POINT FIVE.

The Findings of Fact, Conclusions of Law and Judgment of the Trial Court Are Not Supported by the Evidence.

The claims at issue were allowed without amendment by the Patent Office, and with the R. H. Boggs Patent No. 2,538,230 having been cited as a reference. Boggs as a reference was the closest cited by the Patent Office, and is of particular importance in that it is taken from the same field of the art as plaintiff's invention, namely, lawn trimming and edging equipment.

The prior patents cited by defendants in their answer [Tr. pp. 53-54] all pertain to the art of logging and timbering devices, and are clearly taken from a non-analogous field of the art to that of lawn trimming and edging equipment.

The Trial Court failed to realize that the patentable novelty of plaintiff's invention as defined in the claims in suit resides in the assembly of a minimum number of old elements into a novel combination that permits the user of the invention to either edge or trim grass, and to at all times control the depth of the edging or height of the trimming by simply varying the angular position of the engine-supporting base relative to the ground surface. Plaintiff's invention as described and claimed in Patent No. 2,618,919 could also trim and edge a lawn, but only by means of a combination of elements that included forwardly extending members, racks, levers and plates which form no part of plaintiff's second form of invention as defined in the claims at issue. The forwardly extending members, racks, levers and plates would serve absolutely no useful function if included as a part

of the combination of elements defined in the claims in suit, but would be mere surplusage.

Therefore, the Trial Court was in error in restricting the scope of the claims at issue [Tr. pp. 67-68] on a device that is structurally different from the first form of the invention, and operates in a completely different manner.

This very question was presented to this Court in *Ry-Lock Co. Ltd. v. Sears, Roebuck & Co.* (C. C. A. 9), 107 U. S. P. Q. 292 at 294-295, in which it was stated:

“This invention, made up by combination of elements, in a manner which was sufficiently new and novel to measure up to the accepted standards of invention, was not, in the language of *Himes v. Chadwick*, 9 Cir., 199 F. 2d 100, 95 U. S. P. Q. 59, 63, ‘a mere aggregation of a number of old parts.’ Hence a finding which, as here, picks out one element in one prior patent and another element in another prior patent as a demonstration of anticipation, is manifestly insufficient to overcome the presumption arising from the issuance of the patent, a presumption reemphasized by the existing Act. 35 U. S. C. A. 282.

* * * * *

“This lever tension arm in the accused device is more flimsy and would appear to be more difficult to assemble than that of *Ry-Lock*, but it produces ‘substantially the same result in substantially the same way’ and infringement results. *Royal Typewriter Co. v. Remington Rand*, 2 Cir., 168 F. 2d 691, 692, 77 U. S. P. Q. 517, 518.”

This decision is applicable in the present instance where defendants only departed from the structure of plaintiff’s

invention by angularly supporting the base by means of a wheel and lever, rather than a pivotally supporting wheel.

Also, in *Stearns v. Tinker & Rasor* (C. C. A. 9), 104 U. S. P. Q. 234, 239, this Court stated:

“The rule laid down by many of the authorities is that whether arts or uses are analogous depends upon the similarity of their elements and purposes. It is said that if the elements and purposes in one art are related and similar to those in another art and because and by reason of that relation and similarity make an appeal to the mind of a person having mechanical skill and knowledge of the purposes of the other art, then such arts must be said to be analogous; and, if the converse is true, they are non-analogous arts. *A. J. Deer Co., Inc. v. U. S. Slicing Machine Co.*, 7 Cir., 21 F. 2d 812, 813; *Copeman Laboratories Co. v. General Plastics Corp.*, 7 Cir., 149 F. 2d 962, 65 U. S. P. Q. 550; *Allied Wheel Products v. Rude*, 6 Cir., 206 F. 2d 752, 755, 97 U. S. P. Q. 510, 512-513; 69 C. J. S., Sec. 53, p. 266. Even if we assume here a relation and similarity of elements in holiday detectors and snap-switches, the purpose of the snap-switch art, *i.e.*, to open and close an electric circuit, has no relation or similarity to the purpose of the art of holiday detection, *i.e.*, to determine the condition of pipe coating by subjecting it to electrical inspection.”

In view of the above decisions the Trial Court was clearly in error to restrict the scope of the claims in suit to the extent of holding that the accused devices do not infringe same.

POINT SIX.

The Judgment of the Trial Court Should Be Reversed.

The Judgment of the Trial Court should be reversed as to infringement, and the case remanded to the Trial Court for trial on the validity of the claims at issue.

Respectfully submitted,

WILLIAM C. BABCOCK,

Attorney for Appellant.

